



ALASKA MEETING ON CWA §404 ASSUMPTION



August 31, 2021

2:30 pm– 4:00 pm Pacific Time



CWA §404 ASSUMPTION: WHAT AND HOW

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CWA §404 ASSUMPTION: WHAT & HOW

- CWA § 404 and Assumption Authority
- States Views on Benefits and Challenges to Assumption*
- EPA's role
- CWA § 404 vs § 402
- Requirements for CWA §404 Assumption
 - Assumption package
 - The Assumption approval process



CWA §404 ASSUMPTION AUTHORITY

- CWA §404
 - A permit is required before dredged or fill material may be discharged into waters of the United States.
- CWA §404(g)
 - States and tribes may assume, or take over, the permitting responsibility and administration of the CWA §404 permit and enforcement program for certain waters.
 - States and tribes administer the program under their statutes and regulations.
- CWA §404(h) and 40 CFR part 233 lists:
 - State/tribal requirements to assume and administer program
 - EPA responsibilities: approval and oversight
 - Requirements for review and modification of state program
- Program approval
 - The EPA Regional Administrator (RA) approves state program with HQ concurrence.



STATE VIEWS ON BENEFITS*

- State programs can have broader jurisdiction and authorities
 - Scope of waters
 - Activities regulated
 - Incorporation of other authorities
- States are generally more familiar with
 - The resource
 - Local concerns, issues and needs
- State has better information on the resources
 - Monitoring, data collection
- Share responsibility with federal government
 - Adding staff and resources
- State can streamline permitting
 - E.g., with other permit processes

*2007 EPA survey http://www.aswm.org/pdf_lib/hurld.pdf



STATE VIEWS ON CHALLENGES

- Scope of assumed waters
 - Definition of retained waters – Federal Advisory Committee – 2015-2017
 - Jurisdiction – impact on viability of state and tribal program e.g., the 2020 Navigable Water Protection Rule (less CWA jurisdiction)
 - No partial or phased assumption
- Costs – funding and staffing
 - Lack of dedicated implementation funds – EPA cooperative agreement identifying state funding mechanisms
 - No additional 106 funding
- Inconsistencies between state and federal programs - definitions, elements
 - EPA undertaking rulemaking to provide clarity on requirements and help ensure state programs are consistent
- Protection of regarding threatened and endangered species.
 - ESA consultation – 2010 letter to ECOS and ASWM; 2020 Policy Memo
 - State funding and capacity to implement program

Note: blue text is an action EPA has undertaken to address challenges



EPA'S ROLE IN CWA §404 ASSUMPTION

- **Prior to assumption**
 - Work to enhance state capacity
 - Wetland Program Development Grants
 - Provide technical advice

- **Review and approve/disapprove state assumption request**

- **Oversight of assumed program**
 - Coordinate federal review of non-waived permits
 - Review annual report and coordinate with state on enforcement
 - Review and approve modifications of state program
 - Withdraw program approval, if needed



CWA §404 VS §402

■ Scope:

- Currently no partial program approval or phasing in CWA §404 assumption (allowed in §402)
- Corps still retains CWA §404 permitting for some waters of the U.S. like some Section 10 (RHA) waters/navigable waters

■ Approval:

- MOA with EPA and MOA with Corps
- Corps, USFWS, and NMFS comment on request

■ Oversight:

- Includes coordinating Corps, USFWS and NMFS input
- If EPA maintains an objection to a permit, permit processing and decision transferred to Corps



REQUIREMENTS FOR ASSUMPTION

- A state program must be:
 - Consistent with and
 - No less stringent than the Act and implementing regulations

- The approved state program must have:
 - Equivalent scope of jurisdiction (NWPR/WOTUS/New Rule?)
 - Activities regulated are those that are subject to CWA §404
 - Public participation process
 - Consistency with the §404(b)(1) Guidelines
 - Adequate enforcement authority



REQUIREMENTS FOR ASSUMPTION: **ASSUMPTION PACKAGE**

- Includes:
 - Letter from Governor
 - Complete program description
 - Attorney General's statement
 - MOA with EPA Regional Administrator
 - MOA with Secretary of USACE
 - All applicable state statutes and regulations administering the program



REQUIREMENTS FOR ASSUMPTION: **PROGRAM DESCRIPTION**

- **Scope and structure of program**
 - Jurisdiction
 - Activities regulated
 - Anticipated coordination
 - Permit review criteria
 - Scope of permit exemptions
- **Procedures for permitting, administrative and judicial review**
- **Structure and organization of state agencies administering the program**
- **Funding and staffing levels**



REQUIREMENTS FOR ASSUMPTION: PROGRAM DESCRIPTION (CONT.)

- Anticipated workload
- Copies of permit application forms, permit forms and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under the state and those under the Corps' jurisdiction
- BMPs proposed to satisfy exemption provisions



REQUIREMENTS FOR ASSUMPTION: **ATTORNEY GENERAL'S STATEMENT**

- Citations of statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- If applicable, an analysis of authority over Tribal lands e.g., lands owned by the Alaska Native Villages/Corporations
 - Not seeking such authority does not constitute partial assumption



REQUIREMENTS FOR MOA WITH EPA

- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and state roles/coordination regarding:
 - Compliance monitoring
 - Enforcement
- Provisions for modification of the MOA
 - Including transfer or withdrawal



REQUIREMENTS FOR MOA WITH CORPS

- Description of waters of the United States over which Corps retains permitting responsibility:*
- Tidal waters and their adjacent wetlands (adjacent wetlands waterward of agreed to administrative line)
- Waters presently (or with reasonable improvements) used to transport interstate or foreign commerce and their adjacent wetlands – (AKA-some Navigable or Section 10 waters under the Rivers and Harbor Act)
- Procedures for transfer of pending permit applications to the state/tribe
- Identification of Corps general permits to be assumed by the state/tribe
 - Including a transfer plan

* ASA(CW) Guidance to Corps of Engineers - Assumable Waters outlines how retained waters are to be identified.



ASSUMPTION APPROVAL PROCESS

- **Assumption Package submitted to EPA**
 - EPA has 120 days to approve or disapprove the state/tribe request*
 - 30-day EPA review for package completeness
 - Complete; state/tribe is notified
 - Incomplete; package is returned
- **Review period includes:**
 - Review for completeness and notification package is complete
 - Corps, USFWS and NMFS review
 - Comments due to EPA within 90 days
 - Notice of assumption request published in Federal Register and newspapers
 - 45-day comment period
 - Public hearing 30+ days after Federal Register notice published
 - Tribal consultation if appropriate (E.O. 13175)
 - ESA, NHPA and other consultations as appropriate



ASSUMPTION APPROVAL PROCESS (CONT.)

- **RA approves/disapproves request <120 days***
 - If approved: RA notifies the State/Tribe and Corps publishes notice in the Federal Register
 - If not approved: RA notifies the state/tribe and lists revisions needed to obtain approval
- **Upon approval**
 - RA publishes notice in the Federal Register
 - Makes response to comments document publically available through final FR notice or docket
 - Direct response to Corps, USFWS and NMFS
 - Concludes any consultations

* State/Tribe and EPA can agree to an extension of the 120-day statutory timeframe for program review and approval.



STATE/TRIBE ASSUMED CWA §404 PROGRAM & EPA OVERSIGHT

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STATE 404 PERMIT PROCESS

- State transmits notice of every permit application received to EPA
 - But EPA primarily reviews permits identified per the MOA
- State shall not issue a CWA §404 permit to which EPA has objected or placed permit conditions
 - Until all of EPA's concerns are addressed
- All permits must be consistent with the environmental review criteria (i.e., 404(b)(1) guidelines)
- State shall maintain a compliance and enforcement program



EPA OVERSIGHT OF ASSUMED PROGRAM

- **Review of permits not waived in MOA**
 - EPA, Corps, USFWS and NMFS provided opportunity to review public notice
 - EPA has final decision to comment, object or require conditions on a state permit
 - <30 days EPA notifies state of EPA's intent to comment, or retain right to comment
 - <90 days EPA provides comments
- **Program Review and Evaluation**
 - Ensure program consistency
 - Review annual reports
 - Make available for public review
- **Enforcement**



EPA OVERSIGHT: PERMIT REVIEW

- MOA with EPA identifies categories of projects for which EPA review is waived.
 - EPA cannot waive review of:
 - Draft general permits
 - Discharges with reasonable potential to affect threatened or endangered species
 - Discharges that may adversely impact waters of another state
 - Discharges with known or suspected toxic or hazardous pollutants
 - Discharges proximal to public water supply intakes
 - Discharges within critical State/Federal areas



EPA OVERSIGHT: PERMIT REVIEW (CONT.)

- EPA may require review of additional categories or all permits. Some examples include:
 - In NJ, EPA reviews permits for filling >5 acres of freshwater wetlands
 - In FL, EPA reviews permits for discharges impacting compensatory mitigation sites ; and impacting sites that are owned or managed by federal entities, and activities by an applicant that is a federal entity.
- EPA's review, and any objection, shall be based on:
 - CWA
 - CWA 404 implementing regulations
 - 404(b)(1) Guidelines

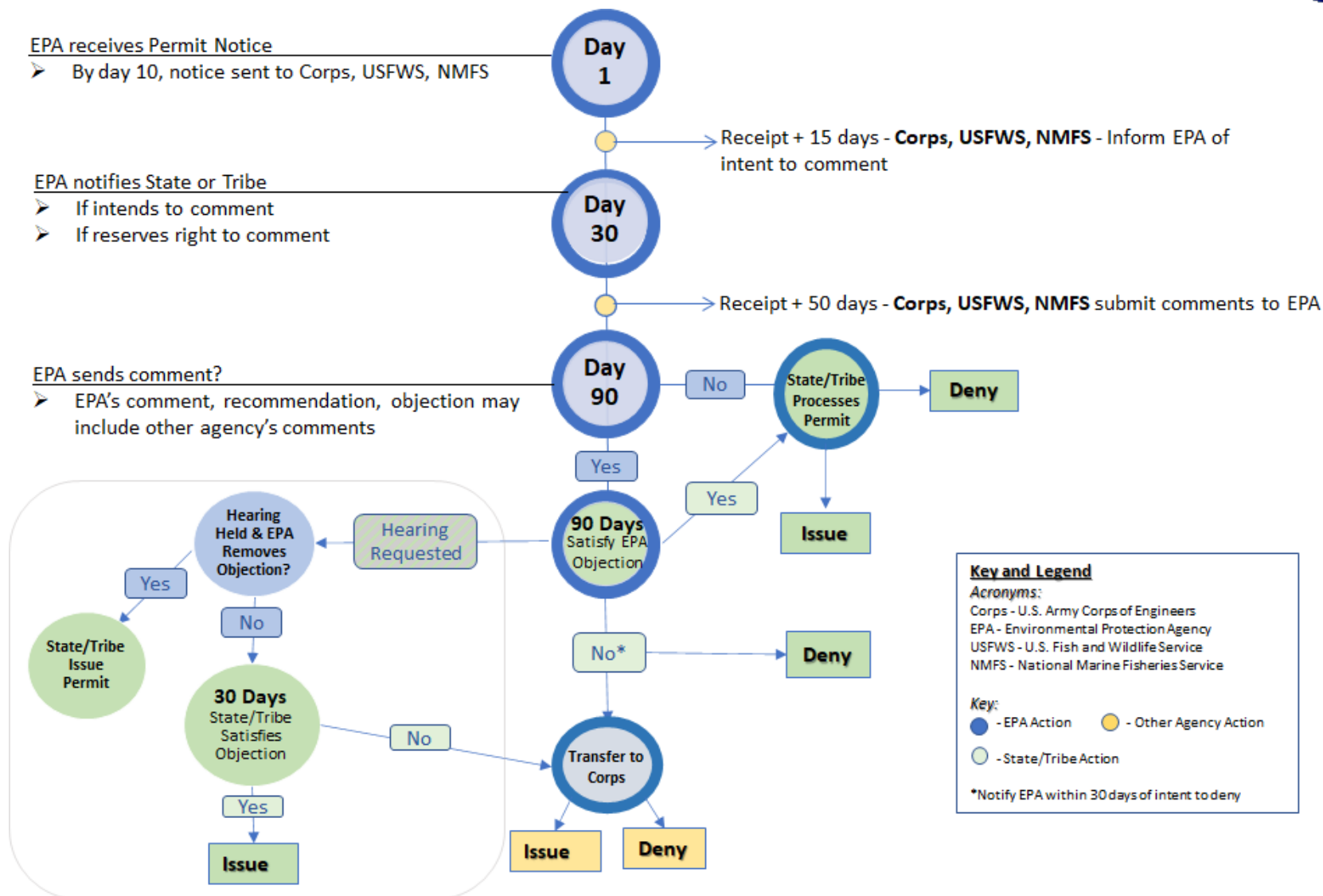


EPA OVERSIGHT: PERMIT REVIEW (CONT.)

- If EPA objects to a permit, or requires permit conditions, the state shall either:
 - Request a public hearing*;
 - Issue a revised permit satisfying EPA's objection or permit conditions < 90 days; or
 - Notify EPA of intent to deny the permit < 30 days
- If the state neither satisfies EPA's concerns nor denies the permit, the Corps shall process the application

* EPA shall conduct a public hearing when requested by the state or if warranted by significant public interest.

EPA Review of State/Tribe Permit Flow Chart





EPA OVERSIGHT: ANNUAL REPORTS

- Program reporting
 - State submits draft annual reports:
 - EPA evaluates state's administration of program
 - Identifies concerns
 - Recommends resolutions
 - Draft annual report made available for public review by EPA
 - EPA publishes notice of availability of final report



EPA OVERSIGHT: ENFORCEMENT

- State is the lead for enforcement and compliance
 - EPA takes collaborative approach
- CWA §309 authorizes EPA to take separate actions for penalties
 - State penalties must be comparable to what EPA would have sought
- CWA §404(n) states that nothing in §404 (including assumption) limits EPA's authority to take action pursuant to CWA §319
 - Includes orders, administrative actions, civil actions and criminal actions



CWA §404 RULEMAKING UPDATE

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CWA §404 ASSUMPTION REGULATION

- **CWA §404(g): Recent Activities**
 - In 2018, the EPA conducted tribal consultation and held pre-proposal input meetings and webinars with tribes and states.
 - States and tribes provided written pre-proposal input in early 2019 for the EPA's consideration.

- **Status and schedule for the §404(g) rulemaking:**
 - The EPA is currently developing options for the rulemaking.
 - The EPA plans to issue a proposed rule in spring of 2022, and a final rule in 2023.



EPA POINTS OF CONTACT

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